

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

App. div. 1

77-1077

To be argued by
RONALD L. GARNETT

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1077

UNITED STATES OF AMERICA,

Appellee,

—v.—

LEANDRO KATZ,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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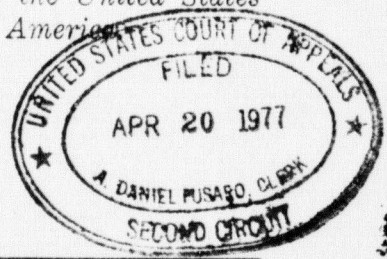


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UNITED STATES OF AMERICA,

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—V.—

LEANDRO KATZ,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Leandro Katz appeals from a judgment of conviction entered on January 28, 1977, in the United States District Court for the Southern District of New York after a three-day jury trial before the Honorable Charles E. Stewart, Jr., United States District Judge, and a jury.

Indictment 75 Cr. 457, a three count indictment filed on May 9, 1975, charged Katz and three others * with

* Defendant Joseph Rollo pleaded guilty to the conspiracy charge and was sentenced, before trial, to three years probation. Defendant John Doe "Walter" is a fugitive. His whereabouts were unknown at the time of the trial. Defendant Stephen Wilkerson pleaded guilty to the conspiracy charge before trial; however, he failed to appear for his sentencing and was declared a fugitive.

having conspired to distribute cocaine in violation of Title 21, United States Code, Section 846, and with having distributed and possessed with the intent to distribute cocaine in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

Trial against Katz began on December 7, 1976.* On December 9, 1976, the jury convicted Katz on the two counts which charged him with distributing cocaine.

On January 28, 1977, Judge Stewart sentenced Katz. Imposition of sentence was suspended, and he was placed on probation for a period of one year on each count, to run concurrently.

Statement of Facts

The Government's Case

The Government's case was presented through the testimony of three witnesses and a stipulation as to the chemical analysis of the narcotic exhibits introduced into evidence. Special Agent Thomas Fekete of the Drug Enforcement Administration testified as the primary witness for the Government. His testimony was corroborated by Special Agent Joseph Keefe, Drug Enforcement Administration, and Robert Lamirata, a New York City police officer assigned to the New York Drug Enforcement Task Force.

In 1974, Agent Fekete, acting in an undercover capacity, was introduced by an informant to Joseph

* On the morning of trial the Government advised the court and counsel that it would not proceed at trial on the conspiracy charge.

Rollo, another defendant, who then introduced Fekete to defendant Stephen Wilkinson. Wilkinson told Fekete that he could supply large quantities of cocaine primarily from outside the United States. In addition, Wilkinson said that he could introduce Fekete to contacts within the United States who sold smaller quantities of cocaine. Through Wilkinson's aid, Fekete did purchase some cocaine from another person in July, 1974. (Tr. 19, 20).*

On August 7, 1974, Fekete had a telephone conversation with Wilkinson concerning Fekete's desire to purchase cocaine that evening. They agreed to meet one-half hour later at the Broome Street Bar in New York City. (Tr. 22). Under surveillance of fellow agents (Tr. 88), Fekete went to the bar as planned. Upon entering the bar, Wilkinson told Fekete that he could purchase two ounces of cocaine; they agreed upon a price of \$3,600. Wilkinson and Fekete then left the bar and, as directed by Wilkinson, drove to 25 East 4th Street, again under surveillance. Appellant Katz answered the door bell at that address and admitted Fekete and Wilkinson. (Tr. 23, 33). The three took an elevator to Katz's eighth floor apartment and entered a workroom in the center of the apartment. (Tr. 23).

Once inside the workroom, Katz produced a large red envelope and removed from it a clear plastic bag which contained white powder. Katz said that it was cocaine and that it was of good quality, containing "rocks and flakes." He then produced a scale and weighed the cocaine. Katz told Fekete that he only had one ounce, rather than two as expected, because he had

* "Tr." refers to the trial transcript, "GX" to Government exhibits, "Br." to the appellant's brief, "App." to the appellant's Appendix.

sold the second ounce earlier to someone else. However, he told Fekete that if he "wouldn't mind waiting around" for a few hours, he (Fekete) could purchase the other ounce later. (Tr. 24). Fekete then took the ounce of cocaine (GX 1) and handed \$1,800 to Wilkinson. Wilkinson turned his back to Fekete and briefly spoke to Katz. Wilkinson and Fekete then left Katz's apartment building and separated to meet later. (Tr. 25, 26).

Later that same evening Fekete and Wilkinson had a telephone conversation and again agreed to meet at the Broome Street Bar. During that conversation Wilkinson stated, "We'll do exactly as we did earlier." (Tr. 28).

Fekete drove to the Broome Street Bar where Wilkinson and a female named "Sue" got into the car. As had happened earlier, they returned to 25 East 4th Street, Katz's apartment building. Fekete and Wilkinson left the car and were admitted again by Katz. Once inside the work area Katz again produced from a large, red envelope a white plastic bag containing a white powder. Katz stated that this ounce of cocaine was identical to the ounce Fekete had purchased earlier that day. The cocaine was again weighed on a scale by Katz. Fekete then handed \$1,800 to Wilkinson, and Katz gave Fekete the ounce of cocaine. (GX 2). Again Wilkinson turned his back to Fekete and spoke with Katz. After a short while Wilkinson and Fekete left the apartment and separated. (Tr. 28, 29).

On September 24, 1975, Fekete and four other agents and police officers arrested Katz in his apartment. Seized from Katz's person was a small folded piece of white paper containing a white powder which Katz said was cocaine. (Tr. 31; GX 3). Katz was asked if he recognized Fekete and he responded by saying that Fekete was the person who had purchased the two ounces of cocaine with Wilkinson. (Tr. 36, 37).

The Defendant's Case

Defendant Katz testified in his own behalf. He testified that he met Wilkinson in 1968 through the latter's wife, Alma, with whom Katz had had an affair while they were both students in Argentina. (Tr. 122, 123). The friendship with Alma continued in New York in 1973 where she introduced Katz to Wilkinson who was by this time her husband. (Tr. 125, 126). In 1973 and 1974 Katz saw the couple approximately four times a month. (Tr. 127).

In August, 1974, Wilkinson asked Katz if he knew of anyone who could obtain for Wilkinson two ounces of cocaine. (Tr. 130, 131). Katz told Wilkinson that he did not know of anyone who could supply the cocaine. (Tr. 131).^{*} Over the next few days Alma called Katz and visited him to encourage him to help her husband, Wilkinson, with the cocaine. He continued to refuse. (Tr. 140). Later, Alma called him early one morning and told him

^{*} Katz testified that he had used cocaine and that the first time he used it was in the summer of 1972. In that year he used cocaine "approximately five times." (Tr. 189). He further testified that he even used cocaine with the Wilkinsons. (Tr. 129, 132). Katz also used cocaine at social gatherings with friends (Tr. 129), as well as in his own home. (Tr. 132). One of the friends, who was present at a party and who used cocaine with Katz, later testified at trial on behalf of Katz as a character witness. (Tr. 198). In 1973, Katz used cocaine approximately twenty times. (Tr. 193). Katz also used cocaine in 1974 and 1975. (Tr. 194, 195). He began purchasing small amounts of cocaine on three or four occasions in 1973, paying approximately thirty dollars each time. (Tr. 129, 196, 197). When he used cocaine in 1973, he was aware that it was illegal to possess the drug. (Tr. 190). He also acknowledged that he knew cocaine was illegal in the United States and that possession and distribution were also illegal. (Tr. 189).

that Wilkinson was upset and had stabbed her in the arm with a fork. (Tr. 151). However, the next day when they met at a coffee-shop, Katz admitted that she looked well with no visible wounds. Alma asked Katz again to get the cocaine; she "made a scene" when Katz refused. (Tr. 151). Later that same afternoon, Alma met Katz at his home and told him she had obtained the cocaine from another source. She then asked Katz to hold the cocaine and give it to Wilkinson later. Katz agreed. (Tr. 156, 203). On August 5, a person named "Tim" delivered the two ounces of cocaine to Katz and instructed him to collect \$3,000 for the two ounces of which he (Katz) could keep \$200. (Tr. 158). During two subsequent telephone conversations with Wilkinson, however, Katz denied having the cocaine. (Tr. 159, 160).

On August 7, 1974, Katz finally gave the two ounces of cocaine to Wilkinson and Fekete on two separate occasions. (Tr. 160-68, 174, 207). Katz testified that when they arrived at his apartment he was very nervous and wary of the stranger, Agent Fekete, and thus refused to complete the sale. Wilkinson tried to reassure him that Fekete was all right. (Tr. 163). Fekete then said, "Well, come on, let's get it over with. You have it here, right? I have the money here. Let's do it." (Tr. 167). Fekete weighed the cocaine on a scale which Katz produced and gave it to him. (Tr. 170).^{*} After weighing the ounce of cocaine, Fekete asked about the second ounce. Katz said he did not have it because he had sold it earlier in the day. Fekete then gave the money to Wilkinson who took some and gave \$1,500 to Katz. Wilkinson and Fekete then left. (Tr. 160-72). A few hours later, Wilkinson called Katz on the telephone. Katz told him he

^{*} Katz later destroyed the scale because he thought it was "very incriminating evidence." (Tr. 211).

had received the second ounce of cocaine. They made arrangements for Wilkinson to return to the apartment. The second transaction was similar to the first, with Katz receiving another \$1,500. The next day Katz delivered \$2,800 to Tim, after having deducted \$200, his profit from participating in the sales. (Tr. 174-76). Katz further testified that he became physically ill after the transactions, but that he did not seek medical attention until twelve days later. (Tr. 182, 183). Finally, Katz testified that when he was arrested in 1975, he had "a spoon's worth" of cocaine in his possession. (Tr. 186).

In addition to Katz's testimony, a number of witnesses, all professors or artists, testified as to his character and good reputation in the art community. (Tr. 214, 219, 223, 234, 228, 231, 233). A number of them, four of six, testified that they had used cocaine at one time or another. (Tr. 218, 221, 225, 234).

Government's Rebuttal

Agent Fekete testified in rebuttal that Katz never expressed reluctance to complete the cocaine sales and that Katz showed no hesitancy during the transactions. Fekete testified that he did not ask Katz to weigh the cocaine and that he did not weigh it himself. Rather, Katz on his own produced the scale and weighed the cocaine. (Tr. 237-39).

ARGUMENT

The District Court Correctly Declined to Charge the Jury on Entrapment.

Katz's sole claim on appeal is that the District Court erroneously declined to charge the jury on entrapment. In arguing that he was entitled to an entrapment charge, Katz relies on two different theories: (1) that Agent Fekete made statements to him immediately before the sale which raised the issue of entrapment, and (2) that his co-conspirators, Alma and Stephen Wilkinson, made statements to him that constituted entrapment. Judge Stewart correctly concluded that, under the law of this Circuit, neither theory supported the submission of entrapment to the jury.

A. The Legal Standard

The defense of entrapment is principally designed to deter improper conduct by law enforcement officers who, in an excess of zeal, may cross the borderline from detection to creation of crime. Thus, the defense focuses on how the crime was initiated and "[i]t is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play." *United States v. Russell*, 411 U.S. 423, 436 (1973), quoted with approval in *Hampton v. United States*, 425 U.S. 484, 489 (1976). See also *Sherman v. United States*, 356 U.S. 369, 372 (1958); *Sorrells v. United States*, 287 U.S. 435, 451 (1932).

In this Circuit, *United States v. Riley*, 363 F.2d 955 (2d Cir. 1966), delineated the test for determining whether a jury should be charged on entrapment. A charge on entrapment is only warranted if, at the outset,

the defendant shows inducement by the Government, meaning that the Government initiated the crime. 363 F.2d at 958-59 & n.2. Absent governmental inducement, the issue of entrapment is not raised. It is the defendant's burden to raise an issue of fact as to inducement, *United States v. Pugliese*, 346 F.2d 861, 863 (2d Cir. 1956); however, that burden is "relatively slight," *United States v. Henry*, 417 F.2d 267, 269 (2d Cir. 1969), *cert. denied*, 397 U.S. 953 (1970).

Assuming that inducement is shown, it is still unnecessary to charge entrapment if uncontradicted proof is adduced showing that the defendant was predisposed to commit the crime. *United States v. Riley*, *supra*, at 959. Only upon production of evidence negating such propensity must the court submit the issue of entrapment to the jury.

B. Statements by Agent Fekete

Katz first claims that statements made by Agent Fekete at the time of the sale of the first ounce of cocaine constituted Government inducement raising the issue of entrapment. To review this issue, it is necessary to view the evidence in the light most favorable to Katz. *United States v. Dehar*, 388 F.2d 430, 433 (2d Cir. 1968). However, even on Katz's own testimony no issue of entrapment was raised.

The statements by Agent Fekete consist of two comments which, according to Katz, Fekete made immediately before Katz sold the first ounce of cocaine on August 7, 1974. When, to Katz's surprise, Wilkinson showed up with a stranger (Agent Fekete), Katz nervously asked Wilkinson, "What is this person doing here and why didn't you tell me you were coming with someone else? You said you were going to come by yourself."

(Tr. 162). Wilkinson vouched for Fekete and tried to reassure Katz. (Tr. 163). However, Katz attempted to tell Wilkinson privately that he did not want to go through with the deal. (Tr. 166). Agent Fekete asked what was going on. Katz replied, "I don't have it. I don't want to go through this. I don't have it . . ." Katz attested that Fekete responded by saying, "Come on, man, you must have it." (Tr. 166).^{*} Wilkinson again attempted to reassure Katz, who said, "I don't know who this guy is." Katz claimed that in response to this, Agent Fekete said, "Well, come on, let's get it over with. You have it here, right? I have the money here. Let's do it." This exchange is now said to amount to entrapment.

Judge Stewart correctly determined that, assuming the truth of Katz's testimony, the statements by Agent Fekete did not raise an entrapment defense.^{**} First, the testimony failed to show any governmental inducement of the

^{*} This testimony did not satisfy defense counsel, who mischaracterized it in a leading question a moment later as follows: "Q. He [Fekete] is the one who said, 'come on, go ahead, do it?'" (Tr. 166).

^{**} Judge Stewart's ruling was as follows:

We note that Mr. Fekete denies that he made the statements alleged by Mr. Katz. But even assuming that Mr. Katz's testimony is correct, I do not think that this conduct on the part of the agent in the middle of the transaction, after Mr. Katz had already come into possession of the amount of cocaine for which he knew Wilkinson had a buyer, is sufficient evidence of government instigation or inducement.

I find this particularly in light of the fact that later in the same day, in response to a telephone call from Stephen Wilkinson, not Agent Fekete, Mr. Katz repeated the transaction with the two men without, it appears, the verbal interchanges which accompanied the first exchange. (Tr. 275-76).

crime. As Judge Friendly noted in *United States v. Riley*, *supra* at 958, the term "inducement," which is frequently misused in this context, relates only to Government *initiation* of the crime. Inducement means "soliciting, proposing, initiating, broaching or suggesting the commission of the offense charged." *United States v. Sherman*, 200 F.2d 880, 883 (2d Cir. 1952) (L. Hand, J.). Here, Agent Fekete's statements could not, as a matter of law, constitute inducement because, by Katz's own testimony, the crime had been initiated upon the solicitations, proposals and suggestions of Alma Wilkinson, all of which occurred long before Katz ever met Agent Fekete. By the time of Agent Fekete's statements, Katz had already obtained the cocaine from "Tim," who promised Katz a \$200 share from the sale. (Tr. 157-58). Having not only put his crime in motion but having brought it to the brink of consummation, Katz cannot claim that Agent Fekete's statements initiated this crime. Of course, without governmental initiation of the crime, the defense of entrapment is not raised.

In this regard, this case falls squarely within the precedent set by *United States v. Reed*, 526 F.2d 740 (2d Cir. 1975), *cert. denied*, 424 U.S. 956 (1976). In *Reed*, this Court held that the jury need not be charged on entrapment where "the invitation to participate came, not from the Government but from the appellant's co-conspirator" because, accordingly, "there was no question of fact on the issue of inducement." 526 F.2d at 743. Similarly, here, Katz presented a version of the facts that put the invitation to participate in the mouths of his co-conspirators, Alma and Stephen Wilkinson. This simply presented no question of inducement to submit to the jury.

However, assuming *arguendo* that Agent Fekete's statements during the sale could be found to constitute inducement, there was uncontradicted evidence of predis-

position which equally supported Judge Stewart's decision to decline the entrapment charge. Evidence of predisposition may be presented "by showing (1) an existing course of criminal conduct similar to the crime for which the defendant was charged, (2) an already formed design on the part of the accused to commit the crime, or (3) a willingness to commit the crime as evidenced by the defendant's ready response to inducement." *United States v. Viviano*, 437 F.2d 295, 299 (2d Cir.), *cert. denied*, 402 U.S. 983 (1971); *United States v. Anglada*, 524 F.2d 296, 299 (2d Cir. 1975). Here Katz's own testimony presented uncontradicted evidence of predisposition in each of those three categories.

First, as to an existing course of criminal conduct similar to the crime for which he was charged, Katz admitted that prior to the sale to Agent Fekete, he had distributed cocaine to Alma Wilkinson on a few occasions. (Tr. 132). Although he claimed that these were "small amounts" and that these were social events rather than sales, each of these distributions nevertheless constituted a violation of the same laws, 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(A), charged in the indictment.*

Second, Katz testified fully about the fact that he formed the design to commit the crime prior to any contact with Agent Fekete. He claimed that after numerous requests from Alma Wilkinson and a few inquiries from Stephen Wilkinson, he agreed to be the middleman for the sale. (Tr. 153). In addition, he obtained the cocaine from "Tim" and made arrangements with "Tim" on the price,

* Cf. *United States v. Swiderski*, Dkt. No. 76-1415, slip op. 1627 (2d Cir. Feb. 1, 1977), where the cocaine was acquired jointly and therefore held not to have been distributed between the co-defendants.

including a \$200 profit for himself. (Tr. 158). Finally, Katz made arrangements with Wilkinson as to the date and time of the transaction. (Tr. 160). If all this does not constitute a previously formed design to commit the crime, it is difficult to imagine what does.

Third, Katz also revealed in his testimony his willingness to commit the crime by his ready response to the "inducement," (assuming Agent Fekete's statements could be characterized as such). Even Katz's description of the sale of the first ounce demonstrated that any reluctance which he articulated related only to his fear of dealing with a stranger. (Tr. 162, 163, 166, 167). Expressing that fear, Katz claimed not to have the cocaine. Agent Fekete told Katz, "You must have it." Katz's next response was to express once more his concern about not knowing who Agent Fekete was. (Tr. 167). Agent Fekete then said, "Well, come on, let's get it over with. You have it here, right? I have the money here. Let's do it." (Tr. 167). Katz's reaction to the last statement was to get the cocaine. This was not only a ready response to the inducement, if any; it was an immediate response amply demonstrating, on Katz's own testimony, his predisposition to commit the crime. The predisposition was further shown by the fact that Katz proceeded without hesitation to complete the second sale. (Tr. 174-76).

This Court has repeatedly upheld district courts' refusals to charge entrapment where there was undisputed evidence of predisposition. *United States v. Reed*, *supra* at 743 (undisputed evidence of defendant's willingness to participate in crime before any contacts with Government agents); *United States v. Licursi*, 525 F.2d 1164, 1169 (2d Cir. 1975) (defendant's testimony revealed that after only one inquiry from Government informer, he went to drug source); *United States v. Miley*, 513

F.2d 1191, 1202 (2d Cir.), *cert. denied*, 423 U.S. 842 (1975) (defendant fully prepared to complete transaction on first occasion he met with Government agents); *United States v. Nieves*, 451 F.2d 836, 838 (2d Cir. 1971) (uncontradicted proof that defendant was willing to supply cocaine); *United States v. Greenberg*, 444 F.2d 369, 372 (2d Cir.), *cert. denied*, 404 U.S. 853 (1971) (as soon as Government agent made proposal, defendant grasped at every opportunity to proceed with crime). In this case where the defendant's own testimony presented evidence of predisposition in each of the three forms recognized by this Court, Judge Stewart's refusal was in full accord with the law in this Circuit.

Decisions of this Court reversing for failure to charge entrapment highlight the correctness of Judge Stewart's ruling in this case. In *United States v. Swiderski*, 539 F.2d 854 (2d Cir. 1976), this Court noted that, on the defendant's testimony, she had been lured to a hotel room by the Government informant on the false pretext that there would be a party taking place, and once there, the informer instilled fear in her. In *United States v. Anglada*, 524 F.2d 296 (2d Cir. 1975), the defendant testified that an informant begged him to get drugs for him. In *United States v. Dehar*, 388 F.2d 430 (2d Cir. 1962), the defendant attested that an informant suggested the transaction, persistently called him and instilled fear in him to force him to commit the crime. Agent Fekete's comments, made long after Katz readied himself to sell the cocaine, do not have any of the elements of instigation present in each of these cases.*

* Even if Katz had a viable contention as to the need for an entrapment charge on Count One—which he clearly does not—he cannot possibly argue that Agent Fekete's comments gave rise to an entrapment defense on Count Two, the second sale

[Footnote continued on following page]

C. Statements by Alma or Stephen Wilkinson

Katz's second theory of entrapment is that Alma or Stephen Wilkinson induced the crime and that they in turn were entrapped by Agent Fekete. This theory, which is unsupported in law, was properly rejected by the trial court.* This Court had held, on one occasion, that where the inducement is by the defendant's co-conspirators, entrapment has not been raised, *United States v. Reed*, *supra*, and, on another, that the entrapment defense does not extend to inducement by private citizens, *United States v. Buie*, 407 F.2d 905, 908 (2d Cir.), *aff'd sub nom. Minor v. United States*, 396 U.S. 87 (1969).** See also *United*

which took place, even according to Katz's testimony, without any protest by Katz. (Tr. 174-76). Since Count Two would stand in any event, under the concurrent sentence doctrine, the conviction on Count One need not be reviewed. *Andresen v. Maryland*, 427 U.S. 463, 469 n.4 (1976); *United States v. Mejias*, Dkt. No. 76-1384, slip op. 2269, 2287-88 (2d Cir. Mar. 10, 1977); *United States v. Vasquez*, 468 F.2d 565, 566-67 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973); *United States v. Gaines*, 460 F.2d 176, 179-80 (2d Cir.), *cert. denied*, 409 U.S. 883 (1972).

In an attempt to avoid the impact of the concurrent sentence doctrine, Katz has argued that the second sale was part of the same course of conduct improperly induced. (Br. 25-26). However, Agent Fekete's remarks, which were directed entirely to completing the first sale, cannot possibly be stretched to support a claim that they induced the second sale.

* Judge Stewart ruled on this argument as follows:

We have found no cases, and the defendant has cited none, that hold that an agency relationship is formed whenever the government through undercover investigators, enters into negotiations with someone with the purpose of engaging in activity which is illegal, where the person so contacted by the government does not know that he or she is dealing with government employees but believes the employee's undercover identity and story. Rather, *United States v. Converzano*, . . . cited by the government, holds the contrary. . . . (Tr. 273-74).

** In *Buie* this Court approved an instruction that entrapment must be done by a Government official or someone acting under his orders and directions. 407 F.2d at 908 n.5.

States v. Converzano, 412 F.2d 1143, 1148 (3rd Cir. 1969). Moreover, the many cases describing the entrapment defense have repeatedly explained that the issue revolves around Government initiation of the crime. See, e.g., *Hampton v. United States*, *supra*; *Sorrells v. United States*, *supra*; *United States v. Riley*, *supra*.

Katz's effort to argue that he was a victim of indirect entrapment relies on the absurd complaint that Agent Fekete put pressure on Stephen Wilkinson, who in turn fought with his wife, who prevailed upon Katz to commit this crime against his will. The only case cited to support this theory of entrapment is *United States v. Rosner*, 485 F.2d 1213 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974), which quotes a charge allowing the jury to consider whether the Government agent utilized the defendant's co-defendants to put pressure on him. 485 F.2d at 1222 n.11. Although this charge (which was, we submit, unduly generous) is quoted in the opinion, this Court did not specifically pass on the propriety of that language or even refer to this aspect of the charge in its opinion. Accordingly, *Rosner* offers no support for this theory of entrapment which has been specifically rejected in the cases which considered the issue.

Finally, even if entrapment could be shown where co-defendants are "utilized" to pressure the defendant, Katz failed to show anything approaching that here. On his testimony, Alma Wilkinson put pressure on him because she wanted to help her husband get money to go to California. (Tr. 151). There is no support in the record for the further proposition that Agent Fekete entrapped the Wilkinsons or that Agent Fekete was utilizing them to entrap Katz. Thus, on the case that Katz presented, he cannot even claim that this far-fetched, unsupported theory of entrapment through use of co-defendants applies to him.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

RONALD L. GARNETT,
AUDREY STRAUSS,
*Assistant United States Attorneys,
Of Counsel.*

Form 280 A. - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

RONALD L. GARNETT being duly sworn
deposes and says that he (~~she~~) is employed in the office of the
United States Attorney for the Southern District of New York.

Stating also that on the 20th day of April, 1977
he (~~she~~) served a copy of the within brief
by placing the same in a properly postpaid franked envelope
addressed:

Ivan S. Fisher
410 Park Avenue
New York, New York 10022

And deponent further says that he (~~she~~) sealed the said envelope
and placed the same in the mailbox for mailing at the United
States Attorney's Office, Southern District of New York, One
St. Andrew's Plaza, New York, N.Y. 10007, in the Borough of
Manhattan, City of New York.


RONALD L. GARNETT

Sworn to me before this

20th day of April, 1977



LAWRENCE FARKASH
Notary Public, State of New York
No. 24-4606580
Qualified in Kings County
Commission Expires March 30, 1979

AFFIDAVIT OF MAILING

State of New York)
County of New York)

THELMA WILKINSON being duly sworn
deposes and says that ~~he~~ (she) is employed in the office of the
United States Attorney for the Southern District of New York.

Stating also that on the 21st day of April 1977
~~he~~ (she) served a copy of the within Gov'ts Brief
by placing the same in a properly postpaid franked envelope
addressed:

Ivan Stéphan Fisher
410 Park Ave.
New York, NY 10022

And deponent further says that ~~he~~ (she) sealed the said envelope
and placed the same in the mailbox for mailing at the United
States Attorney's Office, Southern District of New York, One
St. Andrew's Plaza, New York, N.Y. 10007, in the Borough of
Manhattan, City of New York.

Thelma Wilkinson

Sworn to me before this

21st day of April 1977

Maria A. Israelian

MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-4521851
Qualified in New York County
Term Expires March 30, 1978